No. _____

In The
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

VERSUS

APRIL NICOLE ARMSTARD,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Did the Courts of the State of Louisiana deprive a newborn child of her constitutional rights under the Fourteenth Amendment to the United States Constitution to equal protection of the law and due process of law by quashing a prosecution for cruelty to a juvenile (La. R.S. 14:93) alleged to have been committed by administering illicit drugs to said child via the umbilical cord after birth?

PARTIES TO THE PROCEEDING

The petitioner is the State of Louisiana, through the office of the District Attorney, the plaintiff and the appellee in the courts below. The respondent is April Armstard, the defendant and defendant-appellant in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Louisiana, respectfully petitions for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

OPINIONS BELOW

The Louisiana Supreme Court denied the State's writ application for supervisory and/or remedial writs in an unpublished opinion on January 16, 2009. The State took writs after the Second Circuit Court of Appeal reversed the trial court's ruling on a denial of a motion to quash the indictment. See *State v. Armstard*, 43,333 (La. App. 2d Cir. 8/13/08) 991 So.2d 116. The State applied for rehearing, which was denied on September 11, 2008.

STATEMENT OF JURISDICTION

The Louisiana Supreme Court's opinion was rendered on January 16, 2009. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Louisiana law defines "live birth" in Revised Statute 40:32(9) as:

"(9) 'Live birth' means a birth in which the child shows evidence of life after complete birth. A birth is complete when the child is entirely outside the mother, even if the umbilical cord is uncut and the placenta still attached. The words 'evidence of life' includes heart action, breathing, or movement of voluntary muscles."

La. Children's Code Article 603(5), states:

"'Child' means a person under eighteen years of age who, prior to juvenile proceedings, has not been judicially emancipated under Civil Code Article 385 or emancipated by marriage under Civil Code Articles 379 through 384."

Louisiana Revised Statute 14:2, which provides criminal law definitions, states:

"A. In this code, the terms enumerated shall have the designated meanings:

* * *

(7) 'Person' includes a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not."

* * *

Cruelty to juveniles is defined in LSA-R.S. 14:93, in pertinent part, as:

"(1) The intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain

and suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense; or . . . "

STATEMENT OF FACTS

On February 25, 2007, [V.M.] was prematurely born at twenty-three weeks five days gestation to a mother who was high on cocaine, amphetamines and alcohol. The birth occurred at Louisiana State University Medical Center at Monroe-E.A. Conway. After the birth, the child was taken to St. Francis Medical Center in Monroe where she tested positive for cocaine and barbituates. She was sent to Louisiana State University Medical Center in Shreveport and then to Christus Schumpert in Shreveport where she died two months later on April 25, 2007. The autopsy revealed that the victim died of "complications of prematurity with multiple congenital malformations and acute chorioamnionitis."

On June 14, 2007, the mother, April Armstard, was indicted by a Grand Jury for cruelty to a juvenile (LSA-R.S. 14:93). (See App. 31).

On November 26, 2007, the Honorable Carl Sharp, Fourth Judicial District Court Judge, heard arguments on a motion to quash filed by the defendant. The Court received no evidence in support of defendant's motion to quash. Also, no bill of particulars was before the Court for consideration. Only the bill of indictment and pleadings were before the court

for consideration of the motion to quash. After hearing arguments of the defendant and state, Judge Carl V. Sharp ruled the defendant had not shown that the indictment had failed to charge an offense which was punishable under a valid statute and denied the motion to quash. (See App. 30). The defendant sought a writ application to the Second Circuit Court of Appeal. On August 13, 2008, the Appellate Court found that the trial court abused its discretion. The Appellate Court granted the writ and remanded the case, with instructions that the trial court dismiss the indictment. Judge Drew dissented with written reasons. (See *State v. Armstard*, 43,333 (La. App. 2d Cir. 8/13/08) 991 So.2d 116) (See App. 1). Shortly thereafter, the State filed an application for rehearing. The application for rehearing was denied; however, Justices Carraway and Drew indicated that they would grant rehearing. (See App. 33). The State then filed an application for supervisory and/or remedial writs to the Louisiana Supreme Court, which was denied by a 4-3 split vote on January 16, 2009. (See App. 35).

The State now seeks relief from this Honorable Court.

LAW AND ARGUMENT

STATE'S COMPELLING INTEREST

Under *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and its progeny, the State of Louisiana has a compelling interest in protecting the life of a viable child. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Moreover, the prosecutor has a compelling interest in preserving and protecting the constitutional right of a ***newborn*** child to equal protection of the law and due process of the law. The Fourteenth Amendment of the United States Constitution requires states to provide equal protection and due process under the law to all people within their jurisdiction. U.S. Const. Amend. XIV. To the contrary, April Armstard, the defendant, has no fundamental right, or even protectable interest, to use crack cocaine, either before, during, or after her pregnancy.

On February 25, 2007, [V.M.] was prematurely born at 23 weeks, 5 days gestation to a mother who was high on cocaine, amphetamines and alcohol. She was attached to her mother via the umbilical cord while taking her breaths of life.

[V.M.] was born and while connected to her mother by the umbilical cord, she also had a heart beat while she took breaths. A live birth occurred according to LSA-R.S. 40:32. [V.M.] was a "person" under Louisiana criminal law from the moment of fertilization and implantation in the uterus of her

mother. [V.M.] became entitled to the same rights of protection and due process under Louisiana law as all other children within the jurisdiction of the state of Louisiana.

The Louisiana Legislature has defined in the criminal code a "person" to be a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not. LSA-R.S. 14:2(7).

By enacting such a broad definition of a "person" in our Louisiana law, it can only stand that the intent of the Louisiana Legislature when it drafted and passed this definition was to include ***newborn*** children as persons entitled to equal protection and due process of the law by the United States Constitution. The definition of "child" in Louisiana's Children's Code Article 603(5) fully adopts the definition of "person" because the word "person" is included in the definition of child:

> "Child" means a ***person*** under eighteen years of age, who prior to juvenile proceedings, has not been judicially emancipated under Civil Code Article 385 or emancipated by marriage under Civil Code Article 379 through 384. (emphasis added)

Based upon the foregoing definitions passed by the Louisiana Legislature, a conclusion must be reached that newborn children were intended to be protected by the "cruelty to a juvenile statute" in Louisiana.

The Louisiana Second Circuit Court of Appeal's act of quashing the prosecutor's indictment of April Armstard for the crime of cruelty to a juvenile and the Louisiana Supreme Court's denial of the prosecutor's application for a writ of certiorari denied a newborn child her right to the equal protection of the law and due process of law under the Fourteenth Amendment to the United States Constitution.

The Respondent's criminal conduct exhibited a reckless disregard for the welfare and safety of the victim. As a result of the defendant's actions, the victim endured two difficult months of life. As noted by Justice Drew in his dissent, "this expectant mother had total control over this situation. During the pregnancy, she should not have ingested alcohol and controlled substances. The poor choices of the defendant led to the cruel suffering and death of her own baby."

The Respondent broke the law by using unlawful drugs. This offense was magnified by the fact that she ingested controlled dangerous substances during the gestation of her child. After the birth of this child, while she was still attached to her mother via the umbilical cord, the mother continued to deliver drugs to her child which was an act of cruelty to a juvenile under Louisiana law. Whether the mother took the drugs while [V.M.] was a fetus or a child is not an issue because both are a "person" by definition in Louisiana criminal law. The actions of the Courts in

Louisiana have deprived a person, [V.M.], of her rights to equal protection and due process of law.

The infant victim tested positive for cocaine and barbiturates. Studies have shown that cocaine has been linked to strokes while the baby is still in the womb or shortly after birth. The ingestion of cocaine during pregnancy may result in difficulties in bonding and habituation, attention deficit disorder, impaired growth, and a variety of physical deformities that may result when constriction of blood vessels decreases the transmission of nutrients from mother to an unborn child. (See March of Dimes, Cocaine Use During Pregnancy: Public Health Education Information Sheet). These resulting symptoms easily qualify as acts of cruelty upon the newborn child.

Should this defendant be exempt from prosecution because of her relationship to the victim? Once a mother has made the choice to have a child, she must accept the consequences and obligations that her choice creates. Fetal Rights, 48 Drake L.Rev. 741, 762 (2000). If the decision of this Honorable Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, supra, allows "subsequent to viability" the State, in promoting its interest in the potentiality of human life, to regulate or even proscribe abortion, except where necessary in appropriate medical judgment, for the protection of the life or health of the mother; then certainly, subsequent to viability, the State should be able to proscribe acts of abuse in promoting its interest in the potentiality of human life.

The State submits that this defendant should be held to the same standards as any other violator of state laws. This child who subsequently died was entitled to be spared the cruelty of being born into this world while simultaneously being injected with illegal drugs and alcohol by the mother. After surviving her premature birth, this newborn child was denied her Fourteenth Amendment Constitutional rights by the Louisiana Appellate Courts' act of quashing the defendant's indictment.

The writer of the majority opinion of the Second Circuit Court of Appeal expressed his belief that the actions of pumping drug and alcohol tainted blood to her newborn baby through the umbilical cord was involuntary by the mother. (See *State v. Armstard*, 43,333 (La. App. 2d Cir. 8/13/08) 991 So.2d 116) (See App. 1). The State respectfully disagrees with this opinion. April Armstard voluntarily violated the law and ingested alcohol and controlled dangerous substances during the gestation of her child – a "person" by Louisiana legal definition. Ms. Armstard had given birth previously to other children. She obviously knew that at some point, she would give birth to this child. Ms. Armstard had to know that this child, if born at the time she was taking illegal drugs and drinking alcohol, would be receiving these poisons into her body at birth. Her actions were intentional, criminally negligent mistreatment and/or neglect of her newborn child.

South Carolina has been the only state to decide a landmark case for the protection of children. In *Whitner v. State of South Carolina*, 328 S.C. 1, 492

S.E.2d 777 (S.C. 1997), 28-year-old Cornelia Whitner continued abusing crack cocaine during her third trimester of pregnancy and subsequently gave birth to a child with cocaine residue in his system. The South Carolina Supreme Court affirmed her conviction for criminal child neglect and held that a "viable fetus" is a "person" entitled to protection from criminal child neglect.

Should South Carolina be the only state to hold mothers accountable for introducing illicit drugs on one's child? The District Attorney submits that the laws in Louisiana support prosecution for this ever growing crime. A viable fetus is a person by definition in the Louisiana criminal code. LSA-R.S. 14:2(7).

As prosecutors, this office has seen a growing number of infants injured by prenatal drug addiction each year. Mothers, like the defendant, who consume illegal drugs without concern for their unborn children deserve to be prosecuted. "If mothers-to-be will not stop using drugs because it is 'the right thing to do' then society, and more specifically the legal system, needs to provide them with more incentive via criminal consequences." Fetal Rights, 48 Drake L.Rev. 741, 767-768 (2000).

CONCLUSION

The State has a compelling interest to protect newborn life from harm. With the alarming increase of infants born addicted to drugs, the legal system

must intervene through the criminalization of maternal drug use. In this case, the Respondent illegally ingested controlled dangerous substances and alcohol during the gestation of her child. This newborn victim, [V.M.], endured a horrible death as a consequence of the mother's criminal conduct. [V.M.] has been deprived of the equal protection of law and due process of law given to her by right in the United States of America. The Louisiana statute, cruelty to a juvenile, supports prosecution of this Respondent.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Judgment rendered August 13, 2008.
Application for rehearing may be filed within the delay allowed by Art. 922, La. C. Cr. P.

No. 43,333-KW

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA — Respondent

versus

APRIL NICOLE ARMSTARD — Applicant

* * * * *

On Application for Writs from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 07-F1000

Honorable Carl Van Sharp, Judge

* * * * *

RONALD K. COOK — Counsel for Applicant

JERRY L. JONES
District Attorney — Counsel for Respondent

CYNTHIA P. LAVESPERE
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Assistant District Attorneys

* * * * *

Before STEWART, DREW and MOORE, JJ.

DREW, J., dissents with written reasons.

MOORE, J.

The applicant seeks supervisory review of an order that denied her motion to quash the indictment. Finding that the trial court abused its discretion, we grant the writ and remand to the trial court with instructions to dismiss the indictment.

FACTS

The facts in this record are not such that they evoke sympathy for the defendant. April Nicole Armstard, age 26, gave birth prematurely to her sixth child, a girl, V.M., on February 25, 2007, at LSUMC-E.A. Conway in Monroe. An affidavit in support of the arrest warrant alleges that April was intoxicated when she arrived at the hospital that day, testing positive for cocaine and amphetamines and admitting the use of cocaine and other drugs during pregnancy. The infant was born extremely premature (23 weeks and 5 days) and also tested positive for cocaine and barbiturates. V.M. was immediately placed on life support and transferred to LSUMC in Shreveport where she died on April 25, 2007. The autopsy stated that the cause of death was "complications of prematurity with multiple congenital malformations and acute chorioamnionitis." The latter is a type of bacterial infection affecting pregnant women and their fetuses.

After the infant died, Armstard was arrested on a charge of second degree murder. On June 14, 2007, she was indicted by a grand jury for cruelty to juveniles in violation of La. R.S. 14:93.

On November 2, 2007, defense counsel filed a motion to quash with a supporting memorandum. The memo asserted that Armstard caused no harm to V.M. after she was born, "thus becoming a child," and that the state was trying to create a crime by analogy. The state disputed this, but it agreed that "until the child is born and takes a breath it's not a child." The state argued that after the child is taken from the mother and takes a breath, it is a child even though it is still connected by the umbilical cord. Therefore, the state argued, since the mother had alcohol, cocaine and barbiturates in her bloodstream that were flowing from her body to the child, she was "distributing . . . alcohol and/or drugs to the child."

The defense responded that these acts were committed before the child was born, whereas the victim of cruelty to a juvenile must be a "child" at the time the act is committed.

At the hearing on November 26, 2004, the court indicated that the state would have a difficult burden of proving that the quantity of drugs delivered in the short span of time before the cord was clamped "caused the cruelty or suffering that you're prosecuting this lady about." Nevertheless, the court concluded the state was entitled to try to carry that

burden. The court denied the motion to quash and this writ application followed.

Armstard contends that the trial court erred in implicitly finding that she had the requisite mental state (criminal intent or criminal negligence) to inflict unjustifiable pain and suffering while giving birth to V.M.; to the contrary, her only actions that harmed V.M. occurred during pregnancy, when the fetus was not legally a "child." She further argues that the trial court erred in denying her motion to quash on equal protection grounds: the charge discriminates against her on grounds of her status as a drug user who gave live birth. Finally, the defendant objects on policy grounds that subjecting pregnant mothers to criminal prosecutions under these circumstances will have the undesirable effect of encouraging pregnant women to obtain abortions, no matter how close to birthing, to avoid criminal prosecution.

The state contends that the trial court correctly denied the motion to quash because the defendant has not shown that the indictment fails to charge an offense punishable under La. R.S. 14:93. The statute defines cruelty to a juvenile as, *inter alia,* "[t]he intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain and suffering is caused to said child." *Id.* After the child was born but before the umbilical cord was clamped, the state contends the defendant intentionally and criminally negligently delivered cocaine and barbiturates to the child, and this

conduct constituted the crime. The child's condition at birth, it further argues, is ample proof of the pain and suffering caused by the defendant's actions. Accordingly, the sole issue is whether the state has alleged facts in the indictment that can support the offense of cruelty to a juvenile. It argues that the defendant is improperly using a motion to quash to argue the merits of her defense to an indictment charging a valid offense.

Discussion

An appellate court is allowed to reverse a trial court judgment on a motion to quash only if that finding represents an abuse of the trial court's discretion. *State v. Love,* 00-3347 (La. 5/23/03), 847 So. 2d 1198.

The motion to quash is essentially a mechanism by which to raise pretrial pleas of defense, i.e., matters which do not go to the merits of the charge. La. C. Cr. P. art. 531-534; *State v. Byrd,* 96-2302 (La. 3/13/98), 708 So. 2d 401, *cert. denied,* 525 U.S. 876, 119 S. Ct. 179, 142 L. Ed. 2d 146 (1998); *State v. Perez,* 464 So. 2d 737 (La. 1985); *State v. Carter,* 42,894 (La. App. 2 Cir. 1/9/08), 974 So. 2d 181; *State v. Thomas,* 28,790 (La. App. 2 Cir. 10/30/96), 683 So. 2d 1272, *writ denied,* 96-2844 (La. 4/25/97), 692 So. 2d 1081. In considering a motion to quash, a court must accept as true the facts contained in the bill of information and in the bills of particulars, and determine as a matter of law and from the face of the

pleadings, whether a crime has been charged. While evidence may be adduced, such may not include a defense on the merits. The question of factual guilt or innocence of the offense charged is not raised by the motion to quash. *State v. Thomas, supra; State v. Perez, supra.*

Additionally, we observe that there is an exception to the general rule that a motion to quash is essentially a mechanism by which to raise pretrial pleas of defense, i.e., those matters which do not go to the merits of the charge. In cases in which the state cannot establish an essential element of the offense under any set of facts conceivably provable at trial, the motion to quash is the proper procedural vehicle. *State v. Advanced Recycling, Inc.,* 02-1889 (La. 4/14/04), 870 So. 2d 984; *See also State v. Legendre,* 362 So. 2d 570, 571 (La. 1978) (quashing of a bill of information for aggravated battery was proper when the state alleged that the dangerous weapon used was a concrete parking lot).

In this instance, the bill of indictment charged that the defendant did:

> Count 1 – Cruelty to a Juvenile – between 01 Sep 2006 and 25 Feb 2007 both dates inclusive
>
> willfully and unlawfully commit cruelty to V.M., a juvenile, by intentional or criminally negligent mistreatment or neglect, contrary to the provisions of R.S. 14:93.

The substance of Armstard's motion to quash is that her alleged criminal conduct or act of cruelty, i.e. pumping blood that was tainted with cocaine or alcohol through the umbilical cord after child birth does not constitute an offense punishable under La. R.S. 14:93. In light of these facts and offense charged in this case, we conclude that the motion to quash was the appropriate procedural vehicle for the defendant to raise objections to indictment, and for the following reasons, we hold that the motion should have been granted.

We begin our analysis with the statutory text and the well-established rules of construction of criminal statutes in this state. The starting point in the interpretation of any statute is the language of the statute itself. *State v. Shaw,* 2006-2467 (La. 11/27/07), 969 So. 2d 1233; *Theriot v. Midland Risk Ins. Co.,* 95-2895 (La. 5/20/97), 694 So. 2d 184, 186. The articles of the criminal code "cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3; *State v. Shaw, supra; State v. Skipper,* 04-2137 (La. 6/29/05), 906 So. 2d 399. Further, although criminal statutes are subject to strict construction under the rule of

lenity,[1] *State v. Carr,* 99-2209 (La. 5/26/00), 761 So. 2d 1271, 1274, the rule is not to be applied with "such unreasonable technicality as to defeat the purpose of all rules of statutory construction, which purpose is to ascertain and enforce the true meaning and intent of the statute." *State v. Shaw, supra,* and citations therein; *State v. Brown,* 03-2788 (La. 7/6/04), 879 So. 2d 1276, 1280, and citations therein. Consequently, a criminal statute, like all other statutes, should be interpreted so as to be in harmony with and to preserve and effectuate the manifest intent of the legislature; an interpretation should be avoided which would operate to defeat the object and purpose of the statute. *Brown, supra,* at 1280. *Broussard, supra,* at 884. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *State v. Williams,* 00-1725 (La. 11/28/01), 800 So. 2d 790. Therefore, where the words of a statute are clear and free from ambiguity, they are not to be ignored under the pretext of pursuing

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[1] The principle of lenity developed on the basis that a person should not be criminally punished unless the law has provided a fair warning of what conduct will be considered criminal. *State v. Piazza,* 596 So. 2d 817 (La. 1992). The rule does not merely reflect a convenient maxim of statutory construction, but is based on the fundamental principle of due process that no person should be forced to speculate whether his conduct is prohibited. *Dunn v. United States,* 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979). Questions concerning the ambit of a criminal statute should be resolved in favor of lenity. *Huddleston v. United States,* 415 U.S. 814, 94 S. Ct. 1262, 39 L. Ed. 2d 782 (1974).

their spirit. *State v. Freeman,* 411 So. 2d 1068, 1073 (La. 1982).

In this case, the defendant was indicted on a charge of violation of La. R.S. 14:93, which reads:

> Cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect, by anyone over the age of seventeen, of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense.
>
> Whoever commits the crime of cruelty to juveniles shall be fined not more than one thousand dollars, or imprisoned for not more than two years, with or without hard labor, or both.

The state contends that all the elements of the statutory offense are met under the facts alleged because the defendant is over the age of 17; V.M. was a newborn child under the age of 17; the act of the defendant in giving cocaine and barbiturates to the child constituted intentional or criminally negligent mistreatment; and it caused the baby's unjustifiable suffering and death. We pretermit consideration of the serious evidentiary issue of whether the amount of cocaine and alcohol passed by the mother to the child in the very short time span after birth could alone have caused the clearly unjustified suffering of V.M., and we focus instead on the alleged "act" constituting "mistreatment."

At the hearing on the motion to quash and in its appellate brief and oral argument before this court, the state contended that the defendant intentionally mistreated or was criminally negligent in mistreating the child by giving her cocaine, alcohol, and other drugs through the umbilical cord after birth, which it argues constitutes cruelty or mistreatment on its face. The state presented the following argument in its brief:

> The State's position is that April Armstard knew she was giving her baby cocaine and alcohol via the umbilical cord for which she became criminally liable when her baby was deemed a child by law. Her actions were intentional, criminally negligent mistreatment and/or neglect of her newborn child. She cannot hide behind a fetus. She knew what she was doing and that her actions could cause pain and suffering to her baby.

Neither this statement, nor the indictment itself, clarifies whether the factual basis for the act of mistreatment occurred when she ingested alcohol, cocaine and other drugs, which surely were transmitted to the fetus via the umbilical cord prior to V.M.'s birth, or whether it occurred in the short time span after birth but before the umbilical cord was clamped. The transcript from the hearing on the motion to quash indicates that the state is making the latter allegation; namely, that the criminal conduct constituting the offense occurred after the birth of V.M. The following exchange occurred at the hearing on the

motion to quash between the assistant D.A. and the court:

> BY MR. SYLVESTER:
>
> That's correct, Judge. Mr. Cook, he assumes that the state is saying that the injuries took place to the child while inside the womb. If that was the case, we couldn't do it. There's case law there, statutory law that says it can't be. However, when that child took a breath, when that fetus took a breath, it went from being unborn to a human being.
>
> BY THE COURT:
>
> So you have this – let's talk about a criminal act. The criminal act that you're complaining about here that you're prosecuting the woman for is the consumption of alcohol and/or drugs? Right?
>
> BY MR. SYLVESTER:
>
> No, sir. *It's not the consumption of alcohol or drugs. It's the distributing of those alcohol and/or drugs to the child.*

(Emphasis ours). Thus, the alleged criminal conduct constituting the cruelty or mistreatment charged against the defendant was the transmission of alcohol and drugs from her circulatory system to the child via the umbilical cord after V.M. was born and causing

unjustified pain and suffering within the meaning of the statute.[2]

Our review of the Louisiana jurisprudence involving the charge of cruelty to a juvenile has revealed no cases where the mistreatment or neglect was based on an *involuntary* act such as the pumping of blood through the umbilical cord during the birthing process after having earlier ingested drugs or alcohol. On the contrary, all of the Louisiana cases of which we are aware involve some kind of overt act or omission that was intentional or criminally negligent. For example, in *State v. Helsley,* 457 So. 2d 707 (La. App. 2 Cir. 1984), this court affirmed a cruelty to a juvenile conviction where the defendant disciplined his 12-year-old daughter by striking her repeatedly with a piece of PVC pipe and a pipe wrench. In *State v. Taylor,* 31,860 (La. App. 2 Cir. 2/24/99), 733 So. 2d 72, we affirmed a cruelty to a juvenile conviction where the defendant violently shook the two-month-old victim. In *State v. Burgess,* 475 So. 2d 35 (La. App. 2 Cir. 1985), we affirmed a conviction of cruelty

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[2] The state conceded that V.M. was not a "child" within the meaning of La. R.S. 14:93 until after it was born and cited in its brief La. R.S. 40:32(9), which defines live birth as follows:

> (9) "Live birth" means a birth in which the child shows evidence of life after complete birth. A birth is complete when the child is entirely outside the mother, even if the umbilical cord is uncut and the placenta still attached. The words "evidence of life" include heart action, breathing, or movement of voluntary muscles.

to a juvenile where the defendant burned his two-year-old son with hot water for the purpose of punishment.

In *State v. Sedlock,* 2004-564 (La. App. 3 Cir. 9/29/04), 882 So. 2d 1278, a cruelty to a juvenile conviction was affirmed where defendant kicked a fourth-grade student in the buttocks and then kneed him in the back. In *State v. Booker,* 2002-1269 (La. App. 1 Cir. 2/14/03), 839 So. 2d 455, *writ denied,* 857 So. 2d 476, 2003-1145 (La. 10/31/03), the first circuit affirmed a second degree murder conviction arising out of cruelty to a juvenile where the four-year-old girl died from hypothermia secondary to malnourishment and battered child syndrome.

Section 8 of the Louisiana Criminal Code defines criminal conduct as follows:

> Criminal conduct consists of:
>
> (1) An act or failure to act that produces criminal consequences, and which is combined with criminal intent; or
>
> (2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent, or
>
> (3) Criminal negligence that produces criminal consequences.

Each of Louisiana's statutory criminal offenses requires criminal conduct that fits at least one of these three types of criminal conduct. For example, a prosecution for first degree murder under La. R.S.

14:30 requires the kind of criminal conduct described under subsection "(1)" because the offense requires, in addition to the act causing the death of another person, a "specific intent to kill or inflict great bodily harm." The kinds of criminal conduct defined by the legislature as constituting the offense of cruelty to a juvenile include "intentional or criminally negligent mistreatment or neglect" that causes unjustifiable pain and suffering to the child. La. R.S. 14:93. The term "intentional," within the meaning of this statute, is defined as requiring only "general criminal intent," and not specific intent to cause a child unjustifiable pain and suffering. La. R.S. 14:11; *State v. Cortez,* 96-859 (La. App. 3 Cir. 12/18/96), 687 So. 2d 515; *State v. Morrison,* 582 So. 2d 295 (La. App. 1 Cir 1991); *State v. Green,* 449 So. 2d 141 (La. App. 4 Cir. 1984). The Louisiana Supreme Court has stated that the term "mistreatment" in La. R.S. 14:93 is understood in its common usage and is equated with "abuse." *State v. Comeaux,* 319 So. 2d 897, 899 (La. 1975). Thus the mental element of the crime requires either general criminal intent or criminal negligence or neglect.[3] Both are statutorily defined.

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[3] The word "neglect" in the cruelty to juveniles statute proscribes not mere neglect but "criminally negligent mistreatment or neglect." Only criminally negligent neglect is punishable. *State v. Brenner,* 486 So. 2d 101, 60 A.L.R. 4th 1143 (La. 1986).

La. R.S. 14:10(2) provides:

> General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.

The statute provides an alternative to proving that an accused intentionally mistreated or neglected a child. The statute allows the state to prove the accused was criminally negligent in his mistreatment or neglect of the child. *See State v. Morrison, supra* at 302. Criminal negligence is defined by La. R.S. 14:12 as follows:

> Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

In all the Louisiana cases we have seen involving cruelty to a juvenile, the victim was a child at the time the criminal conduct occurred; that is, each of the acts or omissions that constituted "mistreatment" under La. R.S. 14:93 involved *voluntary* acts or omissions that caused harm or suffering to a postnatal infant or child at the time the conduct occurred. In this instance, however, when the defendant became

intoxicated and when she ingested cocaine and other drugs, V.M. was not yet a "child."[4] As previously noted above, the state conceded that the victim was not legally a "child" at the time Armstard ingested the drugs and alcohol. To avoid this problem, the state has charged that the criminal conduct constituting this particular offense on the child was the defendant's intentional and/or criminally negligent transmission of the drugs through the umbilical cord after the child was born but before the umbilical cord was cut.

The fallacy with the state's theory is that the alleged criminal conduct that comprises intentional or negligent mistreatment or neglect – the "act" of circulating her tainted blood through the umbilical cord to the child – does not constitute "mistreatment or neglect" because it is neither an "act" nor "failure to act," nor, indeed, "criminal negligence." In order for there to be criminal conduct, even criminal negligence, there must be an act or failure to act, where "act" refers to an external manifestation of will through voluntary muscular movement which produces consequences. *See* Reporter's Comment, La. R.S. 14:8, *"General Comment" and "Theory of the 'Criminal Act'*," (West 2007). Although, under the statutory definition of criminal conduct, "criminal

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[4] Evidence in the medical record indicates that the defendant's use of cocaine probably triggered the extremely premature birth. Because the infant was born after only 23 weeks' gestation, it had to be put immediately on life support.

negligence" is not analytically broken down to an "act" plus "negligence" because, as stated by the reporter, the act and the state of mind are inextricably bound, criminal negligence does require an act or failure to act that is *voluntary. Id.*

On the other hand, transmission of the drugs and alcohol via the umbilical cord after the child was born was not a voluntary act or something over which a mother giving birth has any control by her will. This plainly negates the prerequisite for criminal conduct. We therefore reluctantly conclude that the conduct constituting the "mistreatment or neglect" in this child cruelty case cannot constitute the offense of cruelty to a juvenile because it was not a voluntary act.

We also conclude, applying the rule of lenity which requires narrow construction of criminal statutes, that the legislature did not intend for the term "mistreatment or neglect" used in La. R.S. 14:93 to include within its reach pregnant mothers who have used drugs or alcohol prior to the birth of the child and later give birth to a child who suffers from the prenatal conduct.[5] Although the defendant in this

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[5] As acknowledged by the parties at oral argument, the legislature considered but failed to act on two proposed bills to amend La. R.S. 14:93 that would have criminalized the "intentional or criminally negligent prenatal exposure of an unborn child to a controlled dangerous substance" that results in symptoms or harmful effects or the presence of the substance in the newborn. *See* HB 1205, 1210, 2008 Reg. Sess. This fortifies

(Continued on following page)

case was clearly grossly negligent by ingesting cocaine, alcohol and other drugs while she was pregnant, the fetus which she harmed was not a "child" at the time of these acts. La. R.S. 14:2(11) defines an "unborn child" as a human individual from fertilization and implantation until birth, and La. R.S. 14:2(7) defines a "person" to include "a human being from the moment of fertilization and implantation," but La. R.S. 14:93 uses only the term "child," thereby expressly limiting the application of the statute only to the more narrow class of persons who are children. Therefore, applying the rule that the words of a statute are to be given their common and ordinary meaning, we conclude that the word "child" does not include "unborn child" and denotes a more narrow class of human beings than "person."[6]

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our conclusion that the defendant's conduct does not constitute cruelty to a juvenile under existing law.

[6] *See Com. v. Kemp, infra,* p. 15 wherein the court also noted that "it is well settled under federal law that "absent an explicit legislative statement the term 'child' does not include a fetus." *Wynn v. Carey,* 599 F.2d 193, 195 (7th Cir. 1979), citing *Burns v. Alcala,* 420 U.S. 575, 578-81 (1975). Also, in *Parks v. Harden,* 354 F.Supp. 620, 623-4 (N.D.Ga.1973), the court stated:

> "As a matter of semantics, there simply is no way to conclude that the word 'child' includes something else which is not a 'child,' namely an unborn child. In legal terms, the unborn child is normally referred to as a fetus, or 'quick', or in utero. . . . In normal conversational usage, 'child' does not mean fetus. Plaintiffs wish to say that 'child' and 'fetus' are interchangeable, which is simply not the case. A

(Continued on following page)

Our reasoning is further buttressed by The Model Penal Code and the jurisprudence from other states. In his commentary to The Model Penal Code, Professor Dubber states:

> The requirement that criminal liability can be imposed only on the basis of conduct is often called the "actus reus" principle. . . . The Model Penal Code is emphatic about its adherence to the act requirement. Its very first "general principle of liability" proclaims that "[a] person is not guilty of an offense unless his liability is based on conduct that includes a *voluntary act* or the omission to perform an act of which he is physically capable."
>
> * * *
>
> So to qualify as conduct, behavior must be an act and it must be *voluntary*.

Markus D. Dubber. *Criminal Law: Model Penal Code.* New York: Foundation Press (2002). (Emphasis ours). Although The Model Penal Code does not directly define "voluntariness," it does so indirectly by listing acts that do not qualify as voluntary. Similar to the definition in the reporter's comment to La. R.S. 14:8 defining an "act" as "an external manifestation of will" produced by "voluntary muscular movement," section 2.01(2)(d) of The Model Code Code *excludes* from voluntary acts any "bodily movement that

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woman is not considered to have a child when she is carrying a fetus – she is expecting a child."

otherwise is not a product of the effort or the determination of the actor, either conscious or habitual."

The jurisprudence from other states also supports our analysis:

In *Johnson v. State,* 602 So. 2d 1288 (Fla. 1992), an adult mother was convicted of delivery of a controlled substance (cocaine) to her twin children through the umbilical cord after their birth. The mother admitted that she had used cocaine the night before the delivery. The Florida Supreme Court quashed the conviction, however, on the question of whether the ingestion of a controlled substance by a mother who knows the substance will pass to her child after birth is a violation of Florida law. The statutory offense forming the basis of the charge made it "unlawful for any person 18 years of age or older to *deliver* any controlled dangerous substance to a person under the age of 18 years." Fla. Stat. § 893.13(1)(c)1. (Emphasis ours). The state's theory was that the defendant "delivered" cocaine to her twins via blood flowing through the umbilical cord in the 60- to 90-second period after they were expelled from the birth canal but before the cords were severed. The court held that the legislature did not intend for the statutory term "deliver" to include the delivery of the drug by the involuntary act of blood flow from womb to placenta to umbilical cord to newborn after a child's birth.

Similarly, in *Com. v. Kemp,* 1992 WL 613723, 18 Pa. D. & C. 4th 53 (1991), the Court of Common Pleas

of Pennsylvania dismissed the bill of information against the mother charging the crimes of "recklessly endangering another person" and "endangering the welfare of a child," respectively, for allegedly ingesting cocaine while she was pregnant and transmitting the drug through the umbilical cord after the child was born. The court concluded that the facts, even if true, did not constitute unlawful conduct under the statutes charged and quashed the information. The court's rationale for the decision was that "[a] person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable." 18 Pa. C.S. § 301(a). Yet, the inevitable, biological flow of blood is surely not a "voluntary act" within the meaning of the Code. *Com. v. Kemp, supra.*

In *State v. Gray,* 1990 WL 125695, No. L-89-239 (Ohio Ct. App. 8/31/90), the defendant was indicted for child endangering based on her use of cocaine during the last trimester of pregnancy. The trial court concluded that the child endangering statute did not apply to this situation and dismissed the charge against her. On appeal, the State of Ohio argued that the trial court had failed to consider the time the fetus is a child and still attached to the mother and the duty of care created at that point. The appellate court concluded that the Ohio General Assembly did not intend to criminalize the passage of harmful substances from a mother to a child in the brief moments from birth to the severing of the umbilical cord, stating:

> This court cannot conclude that the General Assembly intended R.C. 2919.22(A) to apply to the circumstances of the present case. It is clear that R.C. 2919.22(A) is intended to impose criminal penalties on parents who through their neglect "create a substantial risk to the health or safety of the child." However, we are not persuaded that the General Assembly intended to make a criminal act the passage of harmful substances from a mother to her child in the brief moments from birth to the severance of the umbilical cord. To construe the statute in this manner would mean that every expectant woman who ingested a substance with a potential for harm to her child, e.g., alcohol or nicotine, would be criminally liable under R.C. 2919.22(A). We do not believe such a result was intended by the General Assembly.

Finally, in *Sheriff, Washoe County, Nev. v. Encoe,* 110 Nev. 1317, 885 P.2d 596 (1994), the defendant mother was charged with child endangerment, a violation of Nev. Rev. Stat. § 200.508, when her infant son tested positive for methamphetamines soon after birth. The charge was based on the transmission of an illegal substance from mother to child through the umbilical cord after the child was born and before the cord was severed. The state argued that the criminal act of child endangerment occurred in the brief moments after the child was born and the umbilical cord was cut. The court dismissed this view as a strained and radical application of Nev. Rev. Stat. § 200.508 in violation of due process. Citing

multiple decisions from other jurisdictions, the court expressly delegated to the legislature the responsibility for proscribing illegal substance abuse by expectant mothers. "If the Nevada legislature intended to criminalize prenatal substance abuse, it would have enacted a statute to that effect."

The courts in the decisions discussed above and numerous others have consistently held that the use of controlled substances by a pregnant mother resulting in the transmission or delivery of the substance to her infant after birth through the umbilical cord, is not conduct which can be criminally prosecuted under a delivery of cocaine to a child or child endangerment statute. For example, *see People v. Hardy,* 188 Mich. App. 305, 469 N.W. 2d 50 (Mich. App. 1991) and numerous cases discussed therein.

Finally, we know of only one case in which a state supreme court upheld the state's prosecution of a mother accused of criminal child neglect based on her ingestion of crack cocaine during her pregnancy. In *Whitner v. State,* 492 S.E. 2d 777 (1997), the South Carolina Supreme Court affirmed the guilty plea conviction of the defendant, holding, *inter alia,* that a "viable fetus" is a child within the meaning of the child endangerment statute, and the statute gave the defendant fair notice that ingesting cocaine during the third trimester of pregnancy was proscribed.

In this case, however, we were not presented with the question of whether an extremely premature child born after only 23 weeks gestation, and who

required immediate and continuous life support was a "viable fetus" or a "child" within the meaning of La. R.S. 14:93.

Conclusion

For the foregoing reasons, we conclude that La. R.S. 14:93 was not intended by the legislature to apply to the facts presented in this case. The conduct charged in this case does not constitute "mistreatment or neglect" within the meaning of the statute, nor does it constitute criminal conduct within the meaning of La. R.S. 14:8. We therefore hold that the trial court abused its discretion by denying the defendant's motion to quash.

Accordingly, the ruling of the trial court is reversed. We remand to the trial court with instructions to grant the motion to quash the indictment.

REVERSED AND REMANDED WITH INSTRUCTIONS.

DREW, J., dissenting.

The narrow legal inquiry here is whether or not the trial court erred in denying defendant's motion to quash. The majority writes that our current criminal statutes do not address this factual situation. I respectfully disagree.

Cruelty to Juveniles may be committed by general intent or criminal negligence. La. R.S. 14:93; La.

R.S. 14:10; La. R.S. 14:11. This dissent will focus on criminal negligence.

During the hours before birth, this expectant mother ingested cocaine, amphetamine, and alcohol. Her actions exhibited reckless disregard for the welfare and safety of the unborn child, and of the baby, once born. For the first moments of the infant's short life, the defendant and the child were attached by the umbilical cord. Immediately after birth, but before the cord was clamped, there can be little doubt that this mother's body continued to pump these poisons into the child's system. The amount was probably not much, but I agree with the prosecutor who essentially asked: "How much would be acceptable?" The answer is zero. After her premature birth, V.M. endured two difficult months of life, solely because of the actions of her mother.

Clearly, it was foreseeable that at some point the birth process would occur. Armstard broke the law by using unlawful drugs. Worse, she ingested the controlled dangerous substances during the gestation of her child. This baby didn't have a chance because of the poisons heaped into her system, both during the pregnancy, and in the first moments after her birth. Shortly after the baby's first breath was taken, the hospital personnel placed the very sick infant on life support, where she remained until her death.

Focusing on an equal protection argument, the majority states this prosecution would criminalize the act of giving birth.

I am looking through the other end of the telescope. This prosecution does not criminalize giving birth; instead it criminalizes:

- the ingestion by a mother of unlawful drugs during pregnancy, which quite foreseeably leads to
- delivery of these poisons into the fetus (before birth) and into the newborn child (after birth, for at least a few moments), which quite likely leads to
- a very sick baby fighting to live, against horrendous odds.

This prosecution, if allowed to go forward, would send out a clear message that a pregnant woman in this state must have some modicum of concern for the little life that is totally dependent upon her.

Our current Louisiana statutes can support a prosecution here.

- La. R.S. 14:93(A)(1) reads, in pertinent part, with our emphasis:

  A. **Cruelty to juveniles is:**

  (1) The **intentional** or **criminally negligent** mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said ***child***.

- "Unborn child" is defined in R.S. 14:2(A)(11), as follows:

  "**Unborn child**" means any individual of the **human species** from **fertilization** and implantation **until birth**.

- La. Children's Code Article 603(5), reads:

> "**Child**" means a ***person*** under eighteen years of age who, prior to juvenile proceedings, has not been judicially emancipated under Civil Code Article 385 or emancipated by marriage under Civil Code Articles 379 through 384.[1]

- "Person" is defined in our La. Criminal Code, La. R.S. 14:2(A)(7), as follows, in pertinent part, with our emphasis:

> "**Person**" includes a **human being** from the **moment of fertilization** and implantation. . . .[2]

- "Criminal Negligence" is defined in our La. Criminal Code, La. R.S. 14:12, with our emphasis:

> Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such **disregard of the interest of others** that the offender's conduct amounts to a **gross deviation below the standard of care** expected to be maintained by a reasonably careful man under like circumstances.

This child suffered immeasurably because of her mother's drug usage. The first event in this child's life

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[1] There is no definition of "child" in R.S. 14.

[2] It is arguable that during a pregnancy these definitions overlap. But if this is so, does this beg the question as to why do we have homicides and feticides?

was receiving more drugs and alcohol into her system, a choice made entirely by the child's mother.

The majority's genuine concern is that criminalizing this conduct might lead to abortions by addicted mothers seeking to avoid prosecution. A more likely result, in my view, is that clearly criminalizing this conduct might lead to less drug usage by expectant mothers during pregnancies.

The majority writes that " . . . [T]ransmission of the drugs and alcohol via the umbilical cord after the child was born was not a voluntary act or something over which a mother giving birth has any control by her will."

On the contrary, this expectant mother had total control over this situation. During the pregnancy, she should not have ingested alcohol and controlled substances. The poor choices of the defendant led to the cruel suffering and death of her own baby.

This issue is complex and gut-wrenching. Any legal discussion of the instant facts must be tested against a recent U.S. Supreme Court case, in which the court ruled that a violation of Fourth Amendment rights occurred when a hospital, without consent of the patient, reported incriminating information to the police, for the purpose of instituting criminal charges against a mother who had given birth in their facility to an addicted baby. *See Ferguson v. Charleston,* 99-936, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).

With the luxury of hindsight, it is arguable that alternate criminal charges could have been more appropriate under these facts,[3] instead of cruelty to juveniles. It would be very helpful for the legislature[4] to address and clarify the criminal ramifications, *vel non,* of this maternal conduct.

The trial court was correct to deny the motion to quash. With full respect for the opinion of the majority, I dissent.

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[3] For example, perhaps, negligent homicide, La. R.S. 14:32.

[4] In the most recent legislation session, HB #1205 and HB #1210 were introduced, each having the purpose of amending R.S. 14:93, by adding Subsection (A)(3), which amendment would have clarified the criminality of fact situations similar to this one. Both bills died in committee.

Monday, November 26, 2007
Criminal Section 3, Courtroom 8

Court opened at 9:00 a.m. pursuant to adjournment.

Present: Hon. Carl Van Sharp, Judge; Hons. R. Nicolas Anderson, Stephen T. Sylvester, D. Brian Harkins and Douglas R. Haynes, II, Assistant District Attorneys; Beverly Walker, Court Reporter; Judy Wasson, Deputy Sheriff; and Janetta Patterson, Deputy Clerk of Court.

CASE #: 07-F-001000

STATE OF LOUISIANA	CHARGE:
VS	SECOND DEGREE
APRIL NICOLE ARMSTARD	MURDER CHARGE

Defendant present, represented by Hon. Ronnie Cook. Hearing on Motion to Quash taken up, argued and motion was by the Court denied. Defense objected to the Court's ruling and on behalf of defendant gave oral notice of his intent to apply for Writs to the Second Circuit Court of Appeal of the State of Louisiana. Defense requested a stay of the trial date and motion denied. Trial date maintained for December 3, 2007, Courtroom #9 at 9:00 a.m.

STATE OF LOUISIANA
* PARISH OF OUACHITA *
FOURTH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA FILED: JUN 14 2007

VS. 07-F1000-3 BY: MARIA N. OGLESBY
DEPUTY CLERK
OF COURT

ARMSTARD, APRIL NICOLE
(0701377F)
B/F DOB [Date Of Birth Omitted]
SSN [Social Security Number Omitted]
DL #7992821

BILL OF INDICTMENT

THE GRAND JURORS OF OUACHITA PARISH, CHARGE THAT, ARMSTARD, APRIL NICOLE, IN THE STATE AND PARISH AFORESAID, DID:

COUNT 1 – CRUELTY TO A JUVENILE – BETWEEN 01 SEP 2006 AND 25 FEB 2007 BOTH DATES INCLUSIVE

WILFULLY AND UNLAWFULLY COMMIT CRUELTY TO [V.M.], A JUVENILE, BY INTENTIONAL OR CRIMINALLY NEGLIGENT MISTREATMENT OR NEGLECT, CONTRARY TO THE PROVISIONS OF R.S. 14:93

A TRUE BILL

/s/ Maudie [Illegible]
FOREPERSON OF
THE GRAND JURY

ORIGINAL SIGNED BY
CINDY LAVESPERE
ASSISTANT DISTRICT
ATTORNEY FOURTH
JUDICIAL DISTRICT

Bond set $20,000.00
/s/ John R. Harrison
Judge Pro Tem
6-14-07

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA. 71101
(318) 227-3700

Hon. Jerry L. Jones
District Attorney
Post Office Box 1652
Monroe LA 71210-1652

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P. O. Box 1652
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Cynthia Poston Lavespere
Assistant District Attorney
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Monroe LA 71210

REHEARING ACTION: September 11, 2008

Docket Number: 43,333-KW

STATE OF LOUISIANA

VERSUS

APRIL NICOLE ARMSTARD

BEFORE JUDGES:

James Edward Stewart Sr
J Jay Caraway
Charles B. Peatross
Richard Harmon Drew Jr.
Daniel Milton Moore III

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by State of Louisiana has this day been

DENIED, Caraway, J., would grant rehearing, Drew, Jr., J., would grant rehearing.

FOR THE COURT

Diana Pratt-Wyatt
Clerk of Court

cc:

Hon. Jerry L. Jones, Counsel for the Respondent
Stephen T. Sylvester, Counsel for the Respondent
Ronald Keith Cook, Counsel for the Applicant

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA NO. 2008-KK-2440

VS.

APRIL NICOLE ARMSTARD

IN RE: State of Louisiana; – Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of Ouachita, 4th Judicial District Court Div. G, Nos. 07-F1000; to the Court of Appeal, Second Circuit, No. 43,333-KW

January 16, 2009

Denied.

CDK

CDT

JLW

GGG

JOHNSON, J., would grant.

VICTORY, J., would grant.

KNOLL, J., would grant.

Supreme Court of Louisiana
January 16, 2009

/s/ Jeffrey [Illegible]
Chief Deputy Clerk of Court
For the Court

STATE OF LOUISIANA
*** PARISH OF OUACHITA ***
FOURTH DISTRICT COURT

STATE OF LOUISIANA **FILED: _____**

VS. NO: 07:F1000-3

ARMSTARD, APRIL NICOLE **_____**
(DAID 0701377F) **DEPUTY CLERK OF COURT**

****

MOTION TO QUASH

****

NOW INTO COURT, through undersigned counsel, comes and appears, Defendant, APRIL NICOLE ARMSTARD, who respectfully avers:

On June 14, 2007, pursuant to her Bill of Indictment she was charged with cruelty to a juvenile in violation of LSA R.S. 14:93. For reasons set forth in the attached Memorandum (incorporated herein) said indictment should be quashed.

WHEREFORE, DEFENDANT, APRIL ARMSTARD, PRAYS That the indictment against her be quashed.

Respectfully submitted,

/s/ Ronald K. Cook
RONALD K. COOK – #23692
2805 Armand, Suite B
Monroe, Louisiana 71201
(318) 323-7147 Telephone
(318) 325-8880 Facsimile
Attorney for Defendant

[Certificate Of Service Omitted In Printing]

STATE OF LOUISIANA
*** PARISH OF OUACHITA ***
FOURTH DISTRICT COURT

STATE OF LOUISIANA
VS. NO: 07:F1000-3
ARMSTARD, APRIL NICOLE
(DAID 0701377F)

FILED:_____

_____
DEPUTY CLERK OF COURT

* *

MEMORANDUM IN SUPPORT
OF
MOTION TO QUASH

* *

MAY IT PLEASE THE COURT:

The State is asserting that it can bring criminal charges against a woman for her activities while she was pregnant when the activities may, or may not, have caused harm to an unborn child. The State desires to extend by analogy LSA R.S. 14:93, to justify the charging her with a criminal violation.

It is alleged by the State that Ms. Armstard consumed illicit drugs during her pregnancy, and this consumption of drugs is a violation of La. R.S. 14:93, cruelty to a juvenile.

Precisely, the comes State alleges as follows:

> "Bill of Indictment Count I – Cruelty to a Juvenile – 01 Sep. 2006 and 25

> Feb. 2007, both dates inclusive, willfully and unlawfully commit cruelty to [Name Of Minor Child Omitted], a juvenile, by intentionally or criminally negligent mistreatment or neglect, contrary to provisions of R.S. 14:93." (See Exhibit 1 Bill of Indictment)

LSA R.S. 14:93 states in pertinent part as follows:

> A. Cruelty to juveniles is:
>
> > (1) The intentional or criminally negligent mistreatment or neglect by anyone 17 years of age or older of any child under the age of 17 whereby unjustifiable pain or suffering is caused to said child. Lack of knowledge of the child's age shall not be a defense;. . . .

The District Attorney's office is asking this Court to cross a bright, bold line of separation of powers in prosecuting Ms. Armstard under LSA R.S. 14:93. The Louisiana State Constitution Article II, Section 2 as follows:

> Section 2 Limitations on Each Branch
>
> Section 2. Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one

> of them, shall exercise power belonging to either of the others.

Article III, Section 1 of the Louisiana State Constitution clearly states that the legislative power of the State is vested in the legislature.

It is not contested that the Defendant caused no harm to [V.M.] after she was born and thus becoming a child. It is alleged by the State that any criminal and/or intentional mistreatment of [V.M.] occurred prior to her being born. La. R.S. 14:2(11) states that an "unborn child" means any individual of the human species from fertilization and implementation until birth. It does *not* say the fetus is a 'juvenile', as the state would beguile this Honorable Court to hold.

LSA R.S. 14:93 clearly refers to "child". La. R. S. 14:93 is not intended to include "unborn child" as clearly defined in LSA R. S. 14:2(11).

The District Attorney's office is attempting to create by analogy a crime that the legislature did not intend. La. R.S. 14:3 states in pertinent part that, "[+] the Articles of this Code cannot be extended by analogy so as to create crimes not provided for herein . . . ". Criminal and penal laws are to be strictly construed. *State v Sloane* 1916, 139 La.881, (72 So.2d 428); *State v Cox* Supp. 1977, (344 So.2d. 1024).

Criminal law are *stricti juris,* and the courts will not usurp legislative prerogatives by supplying

definitions omitted in such statutes. *State v. Penniman,* Supp. 1953, 224 La. 95, (68 So.2d. 770).

It is clear that a woman may not be prosecuted under LSA R.S. 14:93 for acts that may have been committed while she was with unborn child, or fetus.

> Criminal statues are subject to strict construction under the rule of lenity; as such, criminal statutes are narrowly interpreted and any ambiguity in the substantive provisions of a statute is resolved in favor of the accused.
>
> ***State v. Lonzo,* 960 So.2d 290 (La. App. 5 Cir. 2007).**
>
> Criminal statues are subject to strict construction under the rule of lenity. Criminal statues are narrowly interpreted, and any ambiguity in the substantive provisions of a statute is resolved in favor of the accused.
>
> ***State v. Lande,* 934 So.2d 280 (La. App. 5 Cir. 2006).**
>
> A criminal statute is to be limited to its plain meaning; when words are clear and free from ambiguity, they are not to be ignored under a pretext of pursuing their spirit. Criminal and penal laws are to be strictly construed, and in the absence of clear legislative intent, any doubts should be resolved in favor of lenity, and not so as to multiply the penalty upon a defendant.

***State v. Anders*, 778 So.2d 1227 (La. App. 4 Cir. 2001).**

Criminal statues are to be strictly construed. Any doubt as to the extent of the coverage of a criminal statute must be decided in favor of the accused and against the state.

***State v. Gomez*, 778 So.2d.549 (La. 2001).**

Criminal statutes are subject to strict construction under the rule of lenity. Criminal statutes are given a narrow interpretation and any ambiguity in the substantive provisions of a statute as written is resolved in favor of the accused and against the state. The principle of lenity is premised on the idea that a person should not be criminally punished unless the law provides a fair warning of what conduct will be considered criminal; the rule is based on principles of due process that no person should be forced to guess as to whether his conduct is prohibited.

***State v. Carr*, 761 So.2d 1271 (La. 2000).**

In *State v Gyles,* 313 So.2d 759 (La. 1995), the Defendant was charged with murder of unnamed child on allegations that he struck a pregnant woman with a stick, causing stillbirth. The Louisiana Supreme Court held that Defendant's conduct was not punishable as murder under the statute defining crime as the killing of a human being.

The Louisiana Supreme Court was clear that statutes should not be extended by analogy. The Supreme Court states in pertinent part as follows:

> Despite this uniform authority to the contrary, the State nevertheless suggests that this Court should extend the definition of the murder statute so as to include as punishable by it the criminal conduct alleged in this case. By all historic, traditional, and express concepts of our legal system, this Court cannot do so. In the first place, this Court cannot create a crime; only the legislature may. La. R.S. 14:7. In the second place, the article of the Criminal Code expressly * * * cannot be extended by analogy so as to create crimes not provided for herein; * * * . La. R.S. 14:3. Thus, a penal statute cannot be extended to cases not included within the clear and unmistakable import of its language, in the interpretation of which its legislative history and revision comments may be considered. See, e.g., *State v. Truby* 211 La. 178, 29 So.2d 758 (1947). As the supreme court of a sister state recently declared, in refusing to accede to a similar argument by the state prosecutorial authorities:
>
> * * * For a court to simply declare, by judicial fiat, that the time has now come to prosecute under section 187 (punishing the crime of 'murder') one who kills an unborn but viable fetus would indeed be to rewrite the statute under the guise of construing it. Nor does a need to fill an asserted 'gap' in the law between abortion and homicide . . . justify

> judicial legislation of this nature; to make it 'a judicial function 'to explore such new fields of crime as they may appear from time to time' is wholly foreign to the American concept of criminal justice' and 'raises very serious questions concerning the principle of separation of powers.' * * * ' *Keeler v. Superior Court,* 470 P.2d 617, 625-26 (1970). *State v. Gyles, supra* at 801, 802.

Furthermore, it should be noted that the legislature has not been remiss in addressing harm to unborn children. In LSA R.S. 14:32.5 the Court defines feticide. Said Statute states in pertinent part that, "Feticide is the killing of an unborn child by the act, procurement, or culpable omission of a person **other than the mother of the unborn child**." (Emphasis added)

Not only does the application of La. R.S. 14:93 to the mother of an unborn child not apply to this situation, but the clear intent of the legislature pursuant to the feticide statute is to exclude the mother from culpable acts.

If the court follows the District Attorney's reasoning in attacking this mother and prosecuting her for acts she committed while she was pregnant, a Pandora's box of confusion and fear will resonate through the entire pregnant community.

> If a mother jogs while pregnant and it is later determined that this jogging may have caused harm to the child, should she be prosecuted?

> If a mother smokes while pregnant and it is later deemed that the smoking caused harm to the child should she be prosecuted?
>
> If the mother lives with a smoker and it is deemed that her act of living with a smoker caused harm to the child should she be prosecuted?
>
> If the mother of the unborn child deems it necessary to get in a vehicle and drive to the grocery store and a wreck occurs along the way causing harm to the unborn child, should she not be imputed with knowledge that such activity could cause harm to the child?
>
> If a mother of an unborn child wears high-heel shoes, trips and falls, and it is deemed this fall caused harm to the child, should she be prosecuted for her acts of wearing high-heel shoes?
>
> If a mother lifts a three-year old, and it is later deemed that this exertion caused harm to an unborn child, should she be prosecuted?

The litany and absurdity of the acts that the mother of an unborn child could be prosecuted (according to the State) is without boundary.

It will be by analogy and contortion that the State attempts to convince this Court that this statute, LSA R.S. 14:93, is applicable where a mother allegedly does an act that causes harm to an unborn child. The legislature pursuant to LSA R.S. 14:3

makes it abundantly clear that such tactics of the prosecution are unacceptable. Jurisprudence on the States's tactics in this case are clear such tactics are improper and not acceptable. The Louisiana Constitution makes it abundantly clear that legislation is reserved for the legislature and not the District Attorney's office and the Court.

Defendant, through undersigned counsel, respectfully avers that the indictment against her should be quashed.

Respectfully submitted,

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No. 08-1269

In The
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

APRIL NICOLE ARMSTARD,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ABSENCE OF JURISDICTION IN THIS COURT

The Constitution vests the judicial power of the federal government in this Court and in such inferior courts as the Congress may from time to time establish. Art. III, § 1, U.S. Const. "The judicial power shall extend to all cases, in law and equity, arising under th[e] Constitution, the laws of the United States, and Treaties made, or which shall be made, under their (the Constitution and federal laws') authority. . . ." Art. III, § 2, cl. *I,* U.S. Const. "The appellate jurisdiction of this Court extends only to cases defined by Congress, and it can be exercised only in the manner prescribed, even though a wider jurisdiction might be permitted by the Constitution. Thus, a jurisdictional statute, such as 28 U.S.C. § 1257, is to be strictly construed." *See* 2 Fed. Proc., L.Ed. § 3:16, collecting authorities.

A party seeking review in this Court must raise a federal question in the state court, and cannot rely on the fact that someone else has raised it there. *Sully v. American Nat. Bank,* 178 U.S. 289, 20 S.Ct. 935, 44 L.Ed. 1072 (1900). Moreover, one cannot invoke the appellate jurisdiction of this Court to vindicate a right of a third party. *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

The Question Presented for Review does not raise an issue of the State's constitutional rights. Rather, it vicariously asserts the alleged rights of the newborn child under the Fourteenth Amendment, in

contravention of the self-imposed limits of this Court's jurisdiction against invoking it to vindicate a right of a third party. *Hanson v. Denckla, supra.*

The alleged federal question presented for review by this Court was never raised by the State in the State Courts, contrary to the requirements of *Sully v. American Nat. Bank, supra,* and its progeny. As shown by the opinion below, respondent argued in the Court below that "the trial court erred in denying her motion to quash on equal protection grounds: the charge discriminates against her on grounds of her status as a drug user who gave live birth." *State v. Armstard*, 991 So.2d 116, at 119, 43,333 (La. App. 2d Cir. 8/13/08). Significantly, nothing more was said about that issue. Instead, the Court of Appeal decided this case upon the adequate, independent state-law ground of the interpretation of La.R.S. 14:93 that the Legislature did not intend by that statute to make prenatal drug use which momentarily entered the newborn's blood stream through the umbilical cord, during the fleeting moment between extrication of the baby from the birth canal until the umbilical cord was clamped, a punishable offense under § 93. 991 So.2d at 124. The Court below observed that

> the Legislature considered but failed to act on two proposed bills to amend La.R.S. 14:93 that would have criminalized the "intentional or criminally negligent prenatal exposure of an unborn child to a controlled dangerous substance" that results in symptoms or harmful effects or the presence of the

> substance in the newborn. *See* HB 1205, 1210, 2008 Reg. Sess. This fortifies our conclusion that the defendant's conduct does not constitute cruelty to a juvenile under existing law.

Id., at 124 n. 5.

The dissenting opinion states that the Majority "[f]ocus[ed] on an equal protection argument" in stating that "this prosecution would criminalize the act of giving birth." That was a mischaracterization of the basis for the Majority opinion of the Court below. The Majority opinion is based solely and simply upon the canons of statutory construction and ignored the respondent's request to decide the case on equal protection grounds. The State may not adopt that erroneous mischaracterization of the Majority's *ratio decidendi,* but changed the alleged victim of that discrimination from the mother to the newborn, and presented in good faith to this Honorable Court that the opinion below was based on equal protection grounds, when it was not. It is significant to note that the State has not specified "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised" by it, as required by Supreme Court Rule 14(1)(G)(I), OR "THE WAY IN WHICH THEY WERE PASSED ON BY THOSE COURTS." *Ibid.* The obvious reason for that omission is that the issue raised by the State's petition refers to deprivation of a newborn child's constitutional rights; whereas, the only equal protection issue raised in any Louisiana Court in this case related to the

mother's right not to be discriminated against as a pregnant drug user solely because her child did not die *in utero*. The issue presented in the State's petition is not properly before this Honorable Court, and on that basis alone, this Honorable Court should deny petitioner's application for a writ of certiorari.

The State well understands that if certiorari is granted in this matter Louisiana and the other forty-nine states can immediately flood the federal system with every prosecution which the State bungles, on the basis of some civil right granted by the U.S. Constitution to the victim, who did not get his just desserts, in seeing the accused successfully tried and sentenced. The number of purely state criminal matters which would be thrust upon this Court, at least in terms of a petition for certiorari, is prodigious.

ABSENCE OF ERROR BELOW

The Second Circuit Court of Appeals for the State of Louisiana lucidly disposed of the State's appeal, but respondent would nevertheless urge this Honorable Court's attention to the case of *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 cited for the proposition that the constitutional requirement of *definiteness* is violated by a statute which fails to give fair notice that the conduct is forbidden by the statute, i.e., that no man should be held criminally responsible for conduct which he cannot reasonably understand to be proscribed. U.S.C.A. Constitution XIV.

The Court below stated (991 So.2d at 122):

> Our review of Louisiana jurisprudence involving the charge of cruelty to a juvenile has revealed no cases where the mistreatment or neglect was based on an *involuntary* act such as the pumping of blood through the umbilical cord during the birthing process after having earlier ingested drugs or alcohol. On the contrary, all of the Louisiana cases of which we are aware involve some kind of overt act or omission that was intentional or criminally negligent. For example . . .

And the Court below proceeds to prove its point through applicable examples of prior cruelty to juvenile prosecutions. The Court then explored the element of criminal intent incorporated within § 93. La.R.S. 14:8 defines criminal conduct in Louisiana as follows:

> Criminal conduct consists of:
>
> (1) An act or failure to act that produces criminal consequences, and which is combined with criminal intent or
>
> (2) A mere act or failure to act that produces criminal consequences, where there is no requirement of criminal intent; or
>
> (3) Criminal negligence that produces criminal consequences.

In view of the Court's deep research into Louisiana law under La.R.S. 14:93 and its recognition that a

voluntary act must exist in order to make anything a crime in this State, which the circulation of the mother's blood into the fetus or newborn immediately after delivery before the umbilical cord is clamped is not, it would change the established law of this State to hold, as the State contends, that La.R.S. 14:93 applies to the involuntary act of pumping the mother's blood into the fetus and, momentarily after birth, into the newborn when he is first recognized under Louisiana law to be a "child" to whom Article 93 applies. While the State Courts have exclusive right to interpret the laws made by its legislature, and this Court's power does not extend to reinterpreting the State law but only to determining whether the State law violates federal constitutional or statutory law or administrative regulations, which are the Supreme Law of the Land, it is not appropriate for this Honorable Court to step into the State Courts' shoes and reinterpret Article 93 in a way that would conceivably make it applicable to respondent's alleged conduct. If this Court were to do that, it would be ignoring its own precedent in *Bouie v. City of Columbia, supra*, in which this Court held (378 U.S. at 353-354, 84 S.Ct. at 2702-03):

> An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. VI, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes

> such action," or "that aggravates a crime or makes it greater than it was, when committed." *Calder v. Bull,* 3 Dall. 386, 390, 1 L.Ed. 648. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. * * * The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," * * *, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. * * *

If this Honorable Court were to do what the State asks, it would not only improperly invade the province of State courts to interpret State laws, but to make such an interpretation and then retroactively apply it to this case would be barred by the Due Process Clause of the Fifth Amendment, just as much as it would be barred by the Fourteenth Amendment Due Process Clause if the State Supreme Court were to change the interpretation of a criminal law and retroactively apply the new interpretation to bring the respondent's conduct within the scope of the prohibitions of the criminal law. The rationale of *Bouie* applies just as much to the decisions of this

Honorable Court as it does to the decisions of inferior courts.

CONCLUSION

For the foregoing reasons, this Honorable Court should follow its precedents self-imposing limits upon its jurisdiction to those cases in which the petitioner has fully presented the federal or constitutional question to the State courts, and its precedents denying discretionary review of State cases when their decisions are predicated upon an adequate, independent state-law ground. This Court should not violate its own precedent in *Bouie v. City of Columbia, supra,* by proposing modifications of La.R.S. 14:93 that would authorize respondent's prosecution when the Louisiana law, as it existed at the time of the alleged offense, did not include cases such as this one. That would violate the Due Process Clause of the Fifth Amendment to the United States Constitution to the same extent that it violates the constitutional prohibition against *ex post facto* application of judicial decisions by State courts under the Due Process Clause of the Fourteenth Amendment, as held in *Bouie,* for a State Court to do so.

This Honorable Court should not open the door to the States to vicariously assert the constitutional rights of victims of crime as grounds for this Court to assert federal jurisdiction over an otherwise purely local case. As a case which does not present an

adequately-raised federal statutory or constitutional question in the State courts, or one which vicariously urges jurisdiction over the alleged violation of the rights of third-party victims in criminal cases, is not within the scope of this Court's jurisdiction, under the self-imposed jurisdictional limitations referenced in the above counter-statement to the State's Statement of this Court's Jurisdiction, is a frivolous case in which to invoke this Honorable Court's discretionary jurisdiction under 28 U.S.C. § 1257, this Honorable Court should impose sanctions upon the petitioner, the State of Louisiana, and require it to reimburse the reasonable attorney's fees expended by the respondent in order to prepare and present this Response in Opposition to Petition for Writ of Certiorari. This Honorable Court should reject the State's petition for a writ of certiorari by denying same.

Respectfully submitted,

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